

FEDERAL CIRCUIT COURT OF AUSTRALIA

NAIN v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 2053

Catchwords:

MIGRATION – Application for review of the decision of the Administrative Appeals Tribunal —whether the Tribunal failed to take into account a relevant consideration – whether the Tribunal failed to have regard to relevant material in its consideration of the applicant’s claims and in the consideration of PIC4020 – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.97, 476

Migration Regulations 1994 (Cth), reg.1.03, Schedule 2, Schedule 4

Cases cited:

NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) [2004] FCAFC 263; 144 FCR 1

Tickner v Chapman [1995] FCA 1726; (1995) 57 FCR 451

NBMZ v Minister for Immigration and Border Protection [2014] FCAFC 38

Minister for Immigration and Citizenship v SZJSS [2010] HCA 48; 243 CLR 164

Proudman v Dayman [1941] HCA 28; (1941) 67 CLR 536

Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

SZFDE v Minister for Immigration and Citizenship [2007] HCA 35

Applicant: AMIT NAIN

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 434 of 2014

Judgment of: Judge Nicholls

Hearing date: 11 June 2015

Date of Last Submission: 11 June 2015

Delivered at: Sydney
Delivered on: 31 July 2015

REPRESENTATION

Counsel for the Applicant: Mr R Nair (by direct access)
Solicitors for the Respondents: Ms D Watson of Australian Government
Solicitor

ORDERS

- (1) The name of the second respondent is amended to read “Administrative Appeals Tribunal”.
- (2) The application made on 25 February 2014 and amended on 17 April 2015 and further amended on 22 June 2015 is dismissed.
- (3) The applicant pay the first respondent’s cost set in the amount of \$6646.00 .

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 434 of 2014

AMIT NAIN

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application made pursuant to s.476 of the *Migration Act 1958* (Cth) (“the Act”) on 25 February 2014 and amended on 17 April 2014 and further amended on 22 June 2015, seeking review of the decision of the then Migration Review Tribunal (now the Administrative Appeals Tribunal) (“the Tribunal”) made on 29 January 2014 which affirmed the decision of the Minister’s delegate to refuse the grant of a Student (Temporary) (Class TU) visa (“the visa”) to Mr Amit Nain (“the applicant”).
2. In evidence before the Court is a bundle of relevant documents (“the Court Book” – “CB”) filed by the Minister, and the affidavit of Ms Alice Martha Bishop-Ebiember of 7 March 2015, secretary,

annexing a transcript of the hearing before the Tribunal on 18 November 2013 (“T”).

Background

3. The applicant applied for the visa on 26 November 2012 (CB 1). There was no indication on the visa application form that the applicant had appointed any representative to assist him. The applicant indicated that he had had no assistance in completing the form (CB 3). This application was refused by the delegate on 24 May 2013 (CB 39 to CB 43). The grant of the visa is governed by the criteria set out at visa subclass 572 of Schedule 2 to the *Migration Regulations 1994* (Cth). Amongst other criteria, the applicant was required to satisfy Public Interest Criterion 4020 (“PIC 4020”) (see cl.572.224(a) of the Regulations).
4. At the relevant time PIC 4020 of Schedule 4 to the Regulations was in the following terms:

“(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

'information that is false or misleading in a material particular' means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Note: For the definition of bogus document, see subsection 5(1) of the Act."

5. Amongst the documents submitted in support of the application for the visa, were bank statements, and a letter said to be from the State Bank of India (CB 22 to CB 24). The evidence before the Court records that, these documents had been sent to the Minister's department from a particular email address (see CB 12.2). This was the address identified in the visa application being the applicant's email address. The applicant agreed that communications to him could be directed to this email address (CB 3.4).
6. A senior case officer with the Minister's department wrote to the applicant on 26 March 2013 (CB 25 to CB 27). The letter was sent to the email address (referred to at [5] above). The letter drew the applicant's attention to PIC 4020 and advised that, following certain investigations, documents he had submitted in support of the visa application were bogus or contained false or misleading information. The applicant was put on notice that he may not, therefore, satisfy PIC 4020. He was invited to comment on this and on the question of whether there were any compelling reasons for waiving the PIC 4020 requirements.
7. The applicant responded by email, on 19 April 2013, sent from the same email address that he had previously provided. He stated that "[a]s there was confusion regarding my financial document and OSHC, I have attached the statement letter and medibank letter..." (CB 28 to CB 34).
8. The delegate refused the application for the visa on 24 May 2013 (CB 39 to CB 43). The decision record was sent to the applicant by email to his email address (CB 35 to CB 38). The basis for the refusal was that the applicant had provided "fraudulent documentation". The decision record explained the reason for this finding. The delegate also noted that the applicant had not directly responded to the material "considered to be non-genuine" and that he (CB 42):

"...did not demonstrate any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiver of PIC 4020 and the grant of the visa."

9. The applicant applied for review to the Tribunal on 3 June 2013 (CB 44 to CB 54). He signed the application form (CB 53). He stated that he did not want to appoint anyone as his representative or “authorised recipient” for the purposes of receiving correspondence (CB 50.3). He asked that correspondence be sent to him at either his postal address or an email address which was the same as the one he provided to the Minister’s department (CB 51, see above at [5]).
10. On 5 June 2013, the Tribunal acknowledged receipt of the application by letter sent to his postal address (CB 55). By letter dated 11 November 2014, he was invited to attend a hearing scheduled for 22 January 2014. It was sent to his postal address (CB 75). The letter also specifically drew the applicant’s attention to PIC 4020 (CB 76 to CB 77).
11. On 8 November 2013, the applicant appointed a registered migration agent to represent him and authorised the receipt of correspondence by the agent (CB 78).
12. The agent made written submissions to the Tribunal on 11 November 2013 on behalf of the applicant (CB 79 to CB 80). The submissions stated that the financial documents submitted to the Department were provided by “his previous agent” and that this had been done without the applicant’s knowledge or consent. The submissions reported that the first time the applicant became “aware of this document was when he received the Department’s decision to refuse his visa application” (CB 79). Further (CB 80):

“...His statement that he is the innocent victim of an unscrupulous agent in submitting documents to the Immigration Department.”

[Errors in the original.]
13. The impugned documents originally before the Minister’s department were directed to the question as to whether the applicant had access to sufficient funds for supporting himself while studying in Australia, such as to satisfy the criteria for the visa directed to financial requirements.

14. The representative provided “additional documents” to the Tribunal “...showing he has access to the required level of funds” (CB 80).
15. The applicant attended the hearing before the Tribunal on 18 November 2013 (he had sought, and was granted, an earlier hearing date). His representative also attended (see CB 122 to CB 124).
16. On 7 January 2014, the Tribunal received a letter signed by the applicant (there does not appear to have been any involvement by his representative, see CB 101 and CB 121) which attached further documents apparently directed to the financial requirement criterion. The applicant indicated he had sufficient funds to support himself through “...my friend Mrs Sarvjeet ARORA” (CB 100).
17. The Tribunal affirmed the delegate’s decision on 29 January 2014 (CB 128 to CB 134). The Tribunal identified as the relevant issue in the review, the question as to whether the applicant met PIC 4020.
18. In its analysis the Tribunal noted that the applicant’s representative had made written submissions on 11 November 2013 and recounted in those submissions what the applicant had “stated” to him (see [14] at CB 130). The Tribunal noted that at the hearing the applicant was asked whether he had provided the documents to the department. The Tribunal recorded that the applicant said “...his then agent had sent the document from the applicant’s email account” ([15] at CB 130).
19. The Tribunal also recorded that at the hearing it put to the applicant that the Australian High Commission in India had “carried out a verification check” and found the bank account to which the initial documents referred “was held by someone else and that the letter was a fake”. The applicant said he remembered being asked by the department to comment on this but he had not responded because his “consultant” “told him not to worry about” it ([16] at CB 130 to CB 131).
20. The Tribunal recorded that it asked the applicant if he knew the document was “false at the time he submitted it”. The Tribunal reported that he said his parents had used an agent to obtain the documents and that he had not wanted to provide false documents ([17] at CB 131).

21. The Tribunal found that the applicant “provided the document” (a letter and statement issued by a bank in India), which was found to be bogus, by email from his “Gmail” account. In making this finding, the Tribunal noted the applicant’s claim that his parents had been “betrayed” by an agent in India, and that the applicant also claimed he had been “misled by his then representative” ([18] at CB 131).
22. The Tribunal was satisfied on the evidence before it that the document was “false and therefore a bogus document under s.97(b) of the Act”. Further, that by providing a copy of the document to the Minister’s department, the applicant had given, or caused to be given, to the Minister, a bogus document. On this basis, the requirements of PIC 4020 were not met ([20] – [21] at CB 131).
23. The Tribunal then turned to consider the question as to whether the requirements of PIC 4020 should be waived. Given the applicant’s ground now, it is important to note that the Tribunal understood, correctly in my view, that the requirements may be waived where there are compelling circumstances that affect the interests of Australia (PIC 4020(4)(a)) or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (PIC 4020(4)(b) and see reg.1.03 of the Regulations) ([22] at CB 131).
24. The Tribunal noted that, at the hearing, the applicant was invited to raise issues relevant to the question of waiving the requirement of PIC 4020. The applicant responded that he had an uncle in Australia, who is an Australian resident. The applicant’s representative asked for, and was granted, further time to prepare submissions on this question, which it was “agreed” would be provided by 7 January 2014 ([23] – [24] at CB 131 to CB 132).
25. The Tribunal noted that on 7 January 2014 the applicant himself, and not his representative, forwarded a number of documents to the Tribunal. These were said to be evidence that his tuition fees would be paid by a friend in Australia. The Tribunal found ([25] at CB 132):

“...There was no mention in any of the documents of PIC 4020 or any discussion of the compelling and compassionate circumstances that affect the interests of an Australia citizen, an

Australian permanent resident or an eligible New Zealand citizen in your case.”

26. The Tribunal noted that it attempted to contact the applicant’s representative to confirm that he no longer represented the applicant, and that no response had been received ([26] at CB 132).
27. The Tribunal found ([27] at CB 132):

“In the absence of any claims made in support of an application for a waiver the Tribunal is not satisfied that the requirements of PIC 4020 should be waived.”

Application to the Court

28. The application as further amended is in the following terms:

“Ground 1: The Tribunal misconstrued and misapplied the law. It failed to take into account a relevant consideration. It ignored relevant material in purporting to determine whether there were compelling circumstances affecting the interest of Australia which justified granting the visa.

Particulars

i) The Tribunal affirmed the delegate’s refusal to grant the visa solely on its finding that applicant did not satisfy the statutory time of decision criterion in regard to PIC 4020.

ii) At the hearing the Tribunal granted the applicant an adjournment to provide submissions in regard to whether there were circumstances that (notwithstanding the Tribunal’s finding that a bogus document had been provided to the Minister) nevertheless justified the grant of the visa.

iii) In response the applicant ‘forwarded a number of documents to the Tribunal’ (CB132 at [25]) which showed that the applicant was a ‘genuine’ student and that giving him a visa would ‘not result in financial cost to the Australia community’.

iv) The Tribunal said (CB 132 at [27] that ‘in the absence of any claims made in support of an application for a waiver the Tribunal is not satisfied that the requirements of PIC 4020 should be waived’.

v) The Tribunal’s reasoning (see CB 132 at [25]) show conclusively that the Tribunal came to the view that there was an

‘absence of any claims made in support of an application for a waiver’ on the basis that there ‘was no mention in any of the documents of PIC 4020 or any discussion of the compelling and compassionate circumstances ...’. The Tribunal proceeded on a construction of the law that the Tribunal was relieved of the obligation to consider the documents in regard to a possible waiver if these documents did not, in terms, specifically refer to PIC 4020 or specifically to the circumstances under which a waiver may be granted or include a discussion of such circumstances. This is a misconstruction and a misapplication of the law. It is jurisdictional error.

Ground 2: The Tribunal misconstrued and misapplied the law. The Tribunal failed to consider whether any involvement the applicant had in the giving of the bogus document to the Minister was due to an honest and reasonable mistake induced by fraud of the applicant’s ‘then agent’.

Particulars

i) The applicant told the Tribunal that he was ‘the innocent victim of an unscrupulous agent.’ He asserted any involvement he may have had in the giving of the bogus document was the result of a honest and reasonable mistake by the applicant induced by the fraud of his ‘then agent’.

ii) The Tribunal did not make a specific finding in this regard. It is however clear that the Tribunal did not reject the evidence given by the applicant. The Tribunal did not make any adverse comments about his credibility.

iii) The Tribunal misconstrued and misapplied the law. Owing to its misconstruction of the legislation, the Tribunal failed to take into account this evidence, this relevant consideration, in determining whether or not the applicant failed to satisfy the consideration, in determining whether or not the applicant failed to satisfy the requirements of PIC 4020, which was the only basis on which the Tribunal affirmed the delegate’s decision to refuse the visa. This was jurisdictional error.”

Consideration

29. Ground one of the further amended application asserts that the Tribunal fell into legal error because it failed to take into account a relevant consideration. This was said to be the material the applicant submitted after the hearing.

30. The applicant's argument was that at the hearing the Tribunal granted the applicant an adjournment to provide submissions as to whether there were circumstances that "nevertheless justified the grant of the visa".
31. The applicant responded by sending a number of documents that showed that he was a "genuine student", and that giving him a visa would "not result in financial loss to the Australian country".
32. In these circumstances, the applicant takes issue with the Tribunal's finding that "...[i]n the absence of any claims made in support of an application for a waiver the Tribunal is not satisfied that the requirements of PIC 4020 should be waived" ([27] at CB 132).
33. The applicant also argued that the Tribunal proceeded on an erroneous understanding of the law in finding that there was an absence of any claims by the applicant, made in support of an application for a waiver. This was said to arise because the Tribunal found "[t]here was no mention in any of the documents of PIC 4020 or any discussion of the compelling and compassionate circumstances", with reference to the documents the applicant had personally provided after the hearing (at [25] at CB 132).
34. Before the Court, the applicant sought to relate this argument specifically to PIC 4020(4) in the following way. There are two "parts" to PIC 4020(4), (a) and (b). PIC 4020(4)(a) directs attention to the interest of the Australian community. PIC 4020(4)(b) directs attention to the interest of, relevantly, Australian citizens or residents and NZ citizens resident in Australia. The criticism of the Tribunal's approach was that the Tribunal was "diverted" by PIC 4020(4)(b), from "looking" at PIC 4020(4)(a).
35. The applicant directed attention to the transcript of the Tribunal hearing. He noted that the Tribunal, after putting both PIC4020(4)(a) and (b) to the applicant, directed the applicant's attention to the need to consider any circumstances relevant to the question of the waiver and invited the applicant's comments.
36. At the Tribunal hearing, the applicant made mention of an uncle in Australia (this may have been in the context of PIC 4020(4)(b) – the

interests of an Australian resident). An adjournment was granted for the purposes of making submissions on the issue of the waiver. The applicant submitted now that the documents provided after the hearing went to PIC 4020(4)(a) (see at CB 110 to CB 120).

37. He also submitted that the documents show that a payment had been made in respect of a particular educational course (in relation to the applicant) and the various bank statements in the name of Ms Arora went to the question of financial capacity.
38. The applicant also argued that these documents show that the applicant was a genuine student, enrolled in an educational course, and that he had sufficient funds, such that he would not be a financial burden in Australia.
39. The “diversion”, therefore, was said to be seen as culminating in the Tribunal’s finding that the applicant had not made any claims in support of the application for a waiver ([27] at CB 132).
40. To make good his argument that he had made such claims, in relation to PIC 4020(4)(a), the applicant relied on certain parts of the Department’s “Procedures Advice Manual” (“PAM 3”) that he said relates to the “student visa scheme.”
41. In essence, these parts of PAM3 set out what are said to be the “broad objectives” and relevant “principles” of the student visa program. The applicant sought to emphasise the following (applicant’s submissions at [7]):

“7. The Procedures Advice Manual (PAM 3) as at the time of decision on 29 January 2014 said:

The student visa program (SVP)

...

2.2 Objectives

The broad objectives of the SVP are to:

- strengthen Australia’s economic, social and cultural interests through the development and implementation of highly effective temporary entry policies for visas issued primarily for study purposes***

- ***promote goodwill and an international understanding of Australia, which are crucial assets for Australia's future trade and security***

- *develop bilateral relations through contributions to the social and economic development of countries, particularly those in the Asia-Pacific region (this is achieved through the bilateral sponsored program administered by AusAID)*

- *provide opportunities for students from developing countries for study in Australia by awarding Australian Government and institution sponsorships and*

- ***provide cultural and economic benefits to Australia through genuine overseas students studying in Australia.***

2.3 Principles

Principles that govern the entry of students and which are reflected in Schedule 2 provisions include:

- ***the entry of students must not result in social or financial cost to the Australian community and***

- *administration of the student sub-program must not conflict with either the Australian Government's overall objectives for the migration program or the broad objectives of the SVP."*

[Emphasis in the original.]

42. In all therefore, the applicant submitted that he gave information to the Tribunal which was relevant to PIC 4020(4)(a) and that the Tribunal did not give meaningful consideration to those documents in the context of PIC 4020(4)(a). In this way, it failed to take into account relevant material and, therefore, fell into legal error.
43. The applicant relied on various authorities to support this latter contention. He relied on *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 for the proposition that the Tribunal failed to consider a claim clearly arising from the documents the applicant submitted, and *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451 for the

proposition that the Tribunal failed to engage in an active intellectual process directed to the documentation (see also *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38 at [151] and the reference to *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164).

44. The principles to which the applicant referred, as arising from the authorities he cited, do not, in my view, assist the applicant in making out his ground. This is so when regard is had to the circumstances in which the issue of the waiver arose, and when the Tribunal's relevant subsequent findings, are seen in light of what was discussed at the Tribunal hearing, and in light of the actual requirements of PIC 4020.
45. Although the issue of the bogus documents is addressed below in ground two, the starting point for the disposition of ground one is that, at the hearing, the Tribunal took some care in explaining to the applicant the relevance of PIC 4020 to the consideration for the grant of student visas (see T3.5). It is important to note, in light of the applicant's arguments, that the Tribunal plainly directed attention to both parts of PIC 4020(4) (see T4.5 to T4.10). It specifically asked the applicant (with his representative present) whether he had "... considered the issue of the compassionate and compelling grounds for waiving...this criteria" (T9.9).
46. The applicant made reference to an uncle in Australia, whom he said was an Australian resident and also would be able to provide funds for him (T10.2). It is of note that, again, the Tribunal emphasised the two relevant "questions" that arise in PIC 4020(4). That is at (a) and (b) (T10.3 to T10.4). The applicant again made reference to his uncle.
47. At this point, the applicant's representative intervened to say that he had not had an opportunity to discuss the waiver issue with the applicant and sought further time to discuss that, and "develop a submission... to actually address those aspects" (T10.8).
48. The Tribunal was "more than happy" to allow the time requested and emphasised the necessity to focus on PIC 4020. The representative and the applicant were given until 7 January 2014 to provide those submissions. As the hearing was held on 18 November 2013, the applicant was given 7 weeks (T1.7).

49. No submissions were received from the representative. As stated above, his continued representation of the applicant came into doubt (CB 125). What was subsequently received from the applicant cannot, on what was before the Tribunal, be described as a written submission. There is simply a list of eight documents, which were attached, with the only statement from the applicant being “[t]hank you for considering the above” (CB 100 and CB 101 to CB 125).
50. There is no explanation from the applicant as to what issue the documents were to be directed, how they were to be understood and what particular claim they were meant to support, or even whether some new claim was being made.
51. It is important to note that, apart from the receipt for a course enrolment (CB 117), the remainder of the documents relate to the financial, banking, and taxation affairs of a “Mrs Sanvjeet Arora”. There is no explanation to the Tribunal as to who Ms Arora is, beyond being described as a “friend”. There is nothing about her citizenship or residency status. The applicant had never mentioned the existence of Ms Arora before, let alone her role in supporting his application for the student visa. There is no mention of the applicant’s uncle, whom he had previously claimed was an Australian resident.
52. I do not agree with the applicant’s submissions now that these documents were “clearly” or “expressly” given in response to the issue the Tribunal had clearly raised at the hearing, and was central to its consideration of the review. That is, the question of the waiver that arose from PIC 4020(4)(a) and (b).
53. As the Minister submits, at best, these documents were directed to a different question. Namely, whether the applicant was a genuine student and had financial support to continue his studies in Australia. In all the circumstances, it was reasonably open to the Tribunal to find that there was an “absence” of submissions made in support of the waiver of the requirements of PIC 4020.
54. Before the Court the applicant emphasised the policy statements said to derive from PAM3. As the applicant made clear before the Court, these statements all related to the matter of the student visa program generally. The applicant was silent in relation to those parts of PAM 3

which relate directly to the matter of the waiver of PIC 4020. These are extracted in the Minister's written submissions (see at [22]):

"The applicant in making this submission draws heavily from the policy documents relating to the student visa program, but does not refer to the policy referable to the exercise of discretion as to whether to waive the requirements of PIC 4020. The relevant extract from the Procedures Advice Manual (PAM 3) which sets out the policy on when it may be considered appropriate to waive the requirements of PIC 4020 is as follows:

27 Compelling and/or compassionate circumstances

27.1 Affecting the interests of Australia

There may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (Note: under policy gaining employer sponsorship is not considered sufficient grounds for a waiver) or*
- Australia's relationship with a foreign government would be damaged were the person not granted the visa or*
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.*

27.2 Departmental policy

It is departmental policy that compelling circumstances affecting the interests of Australia would not include circumstances if the non-citizen merely claims that, if granted the visa, they would:

- work and pay taxes in Australia or*
- pay fees to an education provider or*
- spend money in Australia."*

55. There is nothing in the documents submitted by the applicant to the Tribunal, to support his submission that these were sent in response to the issue raised by the Tribunal. The documents were directed to the

question of the applicant's financial capacity to support himself while in Australia, not whether there were compelling circumstances that affect the interests of Australia, or for that matter, compassionate or compelling circumstances affecting the interests of an Australian citizen or resident or a New Zealand citizen resident in Australia.

56. In this light there is no legal error in the Tribunal's finding that there was an "absence" of claims about the waiver available pursuant to PIC 4020(4). Ground one is not made out.
57. Ground two asserts the Tribunal misconstrued and misapplied the law in that it failed to consider whether the applicant's involvement in the giving of the bogus document to the Minister was due to a reasonable and honest mistake on his part, and the fraud of the applicant's "then agent".
58. Before the Court, the applicant sought to rely on High Court authority, from 1941, dealing with motoring offences (*Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 ("*Proudman*"). For current purposes it is, with respect, more appropriate to rely on *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 ("*Trivedi*"), a recent Full Federal Court case, directly on point with the question to be resolved in the current case.
59. The Full Court (Buchanan J, with whom Allsop CJ and Rangiah J agreed) made clear that the proper construction of PIC 4020 does not require knowing complicity by the applicant. The focus, however, is on the impugned document having the necessary quality of falsity, irrespective of whether or not the visa applicant had knowledge of that fact.
60. This was, in my respectful view, made clear in *Trivedi* at [49]:

"For the reasons I have already given, it should be accepted that PIC 4020 is directed to information or documents which are purposely untrue. It seems to me to be clear from the same analysis that the purpose of PIC 4020 was to render visa applicants ultimately responsible for the veracity of the information and documents supplied to support the application. Although the limited terms of the waiver (and therefore any discretion to excuse non-compliance) make it apparent that innocent errors are not the focus of attention, it is equally clear

that PIC 4020 is directed at the overall integrity of the visa system and as a bulwark against deception and fraud from any quarter associated with a visa applicant. It is not inconsistent with a coherent public policy to make a visa applicant ultimately responsible for purposely untrue material provided with a visa application. It would be an intolerable burden on the administration of the visa system to require that those assessing visa applications not only discover that information or documents are false in a material particular, but also that the visa applicant who provided them knew them to be so. In many cases that would be impossible and would defeat the apparent intent of the provision.”

[Emphasis added.]

61. The applicant’s submissions before the Court seek to divert attention away from the relevant and “ultimate” responsibility imposed on the applicant by PIC 4020, in relation to the provision of bogus documents, and seek to argue that the provision of the bogus document was not the applicant’s fault.
62. The applicant’s submissions conflate two separate concepts arising from the Full Court’s judgment. The applicant relied on *Proudman* for the proposition that “an honest and reasonable belief” on the applicant’s part, makes the applicant’s act in the giving, or the causing of the giving, of the bogus document, “innocent” and, therefore, “affords an excuse” in the context of PIC 4020.
63. The applicant attempted to link this submission with the Full Court’s statement that “...innocent errors are not the focus of attention” (*Trivedi* at [49]) to argue that this supports the applicant’s position that he was innocent in the matter of the giving of the bogus document. In my respectful view, that statement, as it appears in *Trivedi* at [49], was directed to the matter of the purposeful falsity of the document itself, and not to the applicant’s conduct in the giving of it to the Minister.
64. The Tribunal’s approach, as expressed in its decision record, was to focus on whether the document was false and, therefore, a bogus document for the purposes of the Act. Based on the information before it from the Australian High Commission, the Tribunal found that the “fixed deposit copy and the bank letter were fake...”. That is, the

document had the quality of being “purposefully false” (with reference to *Trivedi* at [49]).

65. Once the Tribunal arrived at that finding, consistent with the construction of PIC 4020 as explained in *Trivedi*, the Tribunal found, in the circumstances, that the applicant had given or caused to be given a bogus document to the Minister, and that PIC 4020(1) was not met ([20] – [21] at CB 131). Given what is said in *Trivedi*, there is no error in the Tribunal’s understanding that “the requirements of PIC 4020(1) apply whether or not the document was provided knowingly or unwillingly”. The Tribunal was not obliged to go on and then consider whether the giving of the document was as a result of “innocent errors”, and that the applicant was not knowingly involved.
66. The applicant also relied on *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 (“*SZFDE*”) to allege that he was a victim of “fraud” by his “then agent” and that this stultified the exercise of the Tribunal’s jurisdiction. Further, that the Tribunal was in error in not considering the question of fraud. This immediately directs attention to the relevant circumstances before the Tribunal and the applicant’s evidence.
67. I note, as a preliminary matter, that there is no reference in the application for the visa, or during the processing of that application by the Minister’s delegate, of the applicant having any agent, and for that matter, any other person, representing or assisting him.
68. In its letter of invitation to the hearing the applicant’s attention was drawn specifically to PIC 4020 (CB 76). The applicant would have been on notice of the relevance of this to his case given the delegate’s decision, a copy of which he submitted to the Tribunal with his application for review ([28] at CB 54, and see CB 39 to CB 43).
69. As set out above, the applicant appointed a registered migration agent to represent him after receipt of the Tribunal’s invitation to hearing. In written submissions, the agent conveyed, on behalf of the applicant, that the impugned document was submitted to the Minister’s department by his “previous agent” and “without his knowledge or consent”. Further, that the applicant was not aware of the document

until he received the delegate's decision (CB 79), and that he had been "the innocent victim of an unscrupulous agent" (CB 80).

70. At the Tribunal hearing, the Tribunal specifically raised the matter of the letter and the statement from the State Bank of India. The Tribunal noted that "...you provided" the document "from your Gmail account..." (T6.5). The Tribunal asked the applicant (T6.7):

"[Tribunal]: So did you, did you provide those documents to the Department?"

71. The transcript then records (T6.8 to T7.2):

"[Applicant]: Yes, like I was another occasion [indecipherable] so like I sending my dad that, that document like he is using my email like I am going there to open my email and then he attached that document to there.

...

[Tribunal]: When you say he used your email, um did he use your computer or did he do that through his own office?

...

[Applicant]: No I was in his office.

[Tribunal]: OK. But you had logged in to your, your email account and he sent the material."

[Applicant]: Yes."

72. The Tribunal recounted relevant events concerning the Australian High Commission investigation in India, what follows is (T8.1 to T8.4):

"[Tribunal]: And then on the twenty sixth of March the department contacted you by email.

...

[Tribunal]: And asked you to comment on that adverse information.

...

[Tribunal]: Do you remember all of that?

...

[Applicant]: Yes, yes I remember all of that like when I, they send me the email, so like some of the words I can't on the email so I go to the my counsel attend there and I send him like, I send him that email and I talk about, can you explain about this thing, he say you don't need to worry about, like all good, so he didn't mention about, I said should I gave something, he said no. That's why I didn't provide any comment on that."

73. The applicant continued to give evidence to the effect that he did not want to provide a "fraudulent" document.
74. The applicant relies on the assertion of fraud, and in submissions on *SZFDE*, to argue that he was "innocent" in the matter of the submission of the bogus document. To the extent that that part of the argument relies on his claimed "innocence" then what is set out above stands in answer.
75. The applicant also asserts that there was fraud by the "then agent" on the Minister and the Tribunal. That agent was not identified before the Tribunal or the Court. As set out above, before the Tribunal, the applicant sought to explain why he did not satisfactorily address the department's inquiry regarding the bogus document. The applicant's evidence that his "then agent" (or "counsel") told him not to worry about it, without anything further, either before the Tribunal or the Court, does not constitute fraud on the Minister or the Tribunal.
76. Nor can it be said that the Tribunal ignored, or did not consider, the applicant's evidence. The Tribunal specifically noted "that the applicant claimed that his parents had been betrayed by an agent in India and that he had been misled by his then representative" (before the delegate) (see [18] at CB 131).
77. The Tribunal found in this light, and in the other relevant circumstances (the document was sent by use of his own Gmail account), that the applicant had nonetheless given, or caused to be given, the bogus document to the Minister ([21] at CB 132). The Tribunal was aware of the applicant's claims in this regard in answer to the issue of PIC 4020, and the bogus document. At best, the applicant sought to answer this question by asserting that the document was given without his knowledge. The Tribunal did not accept this. In the

circumstances, no relevant fraud is demonstrated here. Ground two is not made out.

Conclusion

78. The grounds of the application are not made out. No jurisdictional error on the part of the Tribunal is revealed. The application, as further amended, should be dismissed. I will make an order accordingly.

I certify that the preceding seventy-seven (77) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Associate:

Date: 31 July 2015